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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 956

JULIUS GRIECO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER GRIECO'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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THE GOVERNMENT'S STATEMENT OF FACTS

Whatever the position of other petitioners, the government is mistaken in asserting as to Petitioner Grieco that "the sufficiency of the evidence is not challenged here." (Govt. Br. 5). Petitioner has taken the position throughout that the evidence was insufficient to sustain his conviction. He reasserts that position obliquely in his observation here that the government's own evidence, under its theory of the case, in fact established his innocence (Grieco Ptn. 26).

While we do not petition this Court to undertake an exhaustive factual examination, we would not leave the impression that we concede the sufficiency of the evidence.

REPLY TO GOVERNMENT'S ARGUMENT

The government misstates the theory of our argument as to the propriety of the admission of evidence on a conspiracy theory. We do not quarrel with the government's generalization that evidence may be admissible on a conspiracy theory, though no conspiracy is charged (Gov't. Br. 9).

Petitioner argued that matters were admitted into evidence against him which were not properly admissible, *whether or not* a conspiracy was charged (Grieco Ptn. 16-17). Included among those matters improperly admitted, were statements by alleged co-conspirators which the government concedes were made long after the conspiracy had come to an end. The government claims that it was really alright to permit the jury to use such statements against him, despite his absence when the statements were made, because none of the statements implicated *him* (Govt. Br. 10).

But no court has yet held that extra-judicial, post-conspiracy, post-indictment statements, made to FBI agents, are admissible against a man who is absent when they are made, merely because they do not contain his name.

The statements in question contained highly prejudicial matter, such as co-defendants' admissions that they had driven victims to houses of prostitution and that they had been required to accept checks from "hoodlums and racketeers" because of fear of such persons. Accordingly, the government cannot properly offer this Court its bland

assurance that the admission against Petitioner Grieco of these inadmissible matters was "harmless error" (G. Br. 10).

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Petitioner Grieco complained of the admission into evidence against him of a conversation had with an FBI agent concerning a supposedly forged check. The government now admits ". . . that this check was not tied to the scheme." Nevertheless, says the government, the evidence was admissible to show ". . . guilty knowledge—*i. e.*, whether Grieco had handled the other checks innocently or as a 'fence' for false checks." (G. Br. 10).

Thus a *denial* of guilty knowledge as to a check, admittedly unrelated to the indictment, is urged by the government to be equivalent to *admission* of guilty knowledge of checks related to the indictment.

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As to its failure to comply with the requirements of 28 U. S. C. 1732 (b), the government in effect responds that the original reproduction need not, as required by statute, be available for inspection under the direction of the court, provided a police officer is available to testify that he saw the original reproduction at an earlier date. Besides, says the government, the fact that the original was not in court does not show that it was not available (Gov't. Br. 10-11).

But it is for the proponent of evidence to qualify evidence for introduction. It is not for the other party to adduce proof that evidence is *not* admissible. The government argues that the objection to the evidence was "vague". The objection that no sufficient foundation had been laid for admission of the photographs into evidence was made because there was no sufficient foundation. If

that is your objection, those seem apt words in which to make it.

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The government insists that the instructions as to limitations upon statements of co-defendants made out of the presence of one another were adequate (Govt. Br. 15). We have urged that the instruction in question is either meaningless or asserts the opposite from what the government suggests (Grieco Ptn. 15-16). But even assuming the instruction to be both technically correct and crystal clear, it was limited to Counts 1, 2, and 6. As to other counts, conviction of which added ten years to petitioner's sentence, no limitation was placed upon the use to be made of statements of co-defendants out of his presence. Indeed, the trial judge earlier admonished the jury that all evidence might be considered as to petitioner (Appellants' Appendix 161).

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At trial the judge constantly referred to conspiracy counts which didn't exist, and the Court of Appeals stated it was affirming convictions of conspiracy. Hence petitioner's question to this Court as to the propriety of trying and convicting him of an offense with which he was not charged.

The government answers that it has a retrospective ability to get inside the trial judge's head, so to speak, and to opine his purpose in referring to certain substantive counts as conspiracy counts (Govt. Br. 15). Less occultly, we advance the language used by the trial judge as his pronouncement that conspiracy was in fact charged in the indictment:

> "... on a conspiracy count, general testimony ... may be introduced ... but as to other counts the defense should be informed" (Appellants' Appendix 65).

"... Count No. 6 is a conspiracy count ... this is a conspiracy count ..." (Appellants' Appendix 81).

"... you have conspiracy counts here" (Appellants' Appendix 83).

"We have a conspiracy charge here. In the first six counts ... excluding 5, it is a part of the conspiracy charge ..." (Appellants' Appendix 95).

"... we have a conspiracy charge here." (Appellants' Appendix 99).

"If you go through it count by count and then come back to your conspiracy count ..." (Appellants' Appendix 145).

It seems plain as day that the trial judge believed there were conspiracy counts in the indictment. Because that is what the trial judge said. He did *not* say, as the government now claims, that he was merely invoking an evidentiary rule.

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The government believes that it was proper, in the absence of any evidence, to represent to the trial judge and to the Court of Appeals that it had established fictitious first endorsements on the backs of checks. For the first time, the government argues there were inferences to that effect. It draws those inferences from the following facts (Gov't. Br. 17):

(a) That the checks were on out-of-town banks;

(b) payable to cash;

(c) written at the Show Lounge; and

(d) purported to pass through different persons before passing through petitioner's bank account.

To assert from the foregoing that first endorsers were fictitious is equivalent to asserting a rule of law to the effect that endorsements on all checks are presumed fictitious unless the contrary is shown. The government could avoid espousing both its pinchbeck logic and its embarrassing theory by candidly confessing there is not a speck of evidence in the entire record which remotely suggests that any endorsement on any check was fictitious.

The government repeats a statement it made in the Court of Appeals, to the effect that the "handwriting expert had not . . . testified [that the handwriting on Bardin check, Exhibit 23, was similar to Doran's]" (Gov't. Br. 17). But the government went a good deal further in the trial court stating, in dismissing Count 23 to which the check purported to relate, that the handwriting expert *did not make out the check as a Doran check* (original Transcript of Proceedings, page 2287). Thus we urge again that the government knew by its own expert that it could not truthfully claim in the Court of Appeals that the check was a Doran check.

The government only concedes that the bank endorsements on Exhibit 23 are "indistinct" (Govt. Br. 17). But that the jury was justified in accepting the FBI agent's testimony that he made a photograph of the check from microfilm at the bank. Our argument, however, went to the falsification by the government in its "list of exhibits" that the check in fact bore the endorsements in question. In fact the government could not truthfully make that claim, but was willing to make it in the Court of Appeals in order improperly to prevail there.

The government's apology for tampering with the record in the Court of Appeals takes the form of advising this Court just how harmless its effort was (Gov't. Br. 12). We would suggest that the failure of the law to draw

careful distinctions between harmful record tampering and harmless record tampering, does not constitute a blemish.

The government's willingness in this case coldly and designedly to have fabricated its way to conviction and affirmance cannot be excused as a manifestation of zealous advocacy. The government's treatment of Exhibit 38 in the Court of Appeals is instructive. It is discussed at length in Grieco's Court of Appeals Reply Brief, pp. 25-26. In short, to obtain affirmance of one count, the government there advised the court that the face of Exhibit 38 disclosed certain words were capitalized, others not, thus proving alteration of the count exhibit. In fact, the lettering was not at all as represented. The misrepresentation was apparently chanced in the hope that such details would not be checked.

* * *

We concur in the government's view that a Court of Appeals need not set forth its reasons for rejecting a particular argument. But we believe that an argument not plainly frivolous deserves the court's consideration before that argument is rejected. Here the Court of Appeals said that it "had discussed the points that need consideration" (Grieco Ptn. Appendix A., p. 8). From which we infer that the points not discussed by the court were not considered. In view of the fact that the court's consideration of those points would have required reversal, the court erred in not considering them.

CONCLUSION.

We respectfully submit that for the foregoing reasons and for those stated in our Petition for Certiorari, certiorari should be granted here.

Respectfully submitted,

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